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# In the Supreme Court of the United States

OCTOBER TERM, 1938

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No. 660

WILLIAM McCRONE, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI AND FOR A WRIT  
OF MANDAMUS TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT*

---

## MEMORANDUM FOR THE UNITED STATES

### OPINIONS BELOW

The District Court rendered no opinion. Its order of contempt appears at R. 79-83. The opinions in the Circuit Court of Appeals (R. 110-121) are reported at 100 F. (2d) 322.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 13, 1938 (R. 121-122). A petition for rehearing was denied on January 16, 1939 (R. 122). The petition for a writ of certiorari and for a writ of mandamus was filed on February 9, 1939. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

1. Whether the court below correctly held that it had no jurisdiction of the petitioner's attempted appeal in accordance with the rules of practice and procedure in criminal case because of its conclusion that the proceeding is for a civil contempt.

2. Whether a writ of mandamus should issue.

#### STATUTES INVOLVED

The statutes involved are set forth in the appendix, *infra*, pp. 12-13.

#### STATEMENT

On April 21, 1938, petitioner, a resident of Butte, Montana, was personally served with a revenue agent's summons, issued under the authority of Section 618 of the Revenue Act of 1928 (*infra*, p. 13), requiring him to appear before Special Agent DeFoe on that date to give testimony in connection with the tax liability of some person for the years 1932 to 1937, inclusive (R. 22-23, 26). The name of the taxpayer being investigated was not stated in the summons (R. 26). On April 22, 1938, the Government filed a motion in the United States District Court for the District of Montana for an order of attachment of petitioner, requiring him to appear and show cause why he should not submit himself to examination (R. 27). This motion was based upon an affidavit of Special Agent DeFoe

(R. 22-25), in which he stated that as a part of his official duties he was making an investigation of the correctness of a return made under the internal revenue laws by a citizen and resident of Montana, and that he had been informed that the petitioner possessed information concerning this matter (R. 22-23); that the special agent had served the above-mentioned summons or subpoena upon the petitioner (R. 23, 26); that the latter appeared and informed the special agent that he, the petitioner, did not propose voluntarily to answer any questions concerning the subject matter of the inquiry, and did not intend voluntarily to make any statement or give any information whatsoever concerning the subject of the inquiry; and that the petitioner failed and refused to make any statement or to answer any questions or to give any information concerning the subject of the inquiry (R. 23-24). The special agent also stated that from his investigation he believed that the petitioner had personal knowledge of facts pertinent and material to the subject matter of the investigation, and that the petitioner was wrongfully withholding such facts and information and preventing the investigation (R. 24-25).

On April 23, 1938, the petitioner filed an answer, stating that he had appeared and was willing to testify as to any matter the answer to which would not incriminate him, that he had been advised by Special Agent DeFoe that if he refused to answer certain questions that would be taken as a confession of guilt on his part, but that he was willing



again to appear before the special agent, provided a competent stenographer of his own choosing should be allowed to appear (R. 27-28). On this same date the matter was heard by the District Court, which found that the petitioner was regularly required to appear before the special agent, and wrongfully failed and refused to give any testimony. The District Court ordered that the petitioner appear and testify before the special agent on that and subsequent dates, if necessary (R. 29-31).

On April 26, 1938, the special agent filed another affidavit with the District Court (R. 32-40), reciting that after the entry of the above-mentioned order of April 23, 1938, the petitioner appeared before the agent, and was sworn, but refused to answer any question, or to make any statement, as shown by a transcript, "Exhibit B," incorporated by reference (R. 36-37). This transcript (R. 43-45) shows that the petitioner admitted that he had appeared before the special agent pursuant to the order of the District Court, but that he refused to answer nine questions which were propounded to him, upon the ground of self-incrimination. The petitioner was asked (1-2) whether he understood that the inquiry did not relate to his own liability; (3) whether he knew one Ron Pepple; (4) whether he at some time between February 1 and 10, 1937, accompanied Ron Pepple from Butte to Helena, Montana; (5) whether between said dates he had received from Ron Pepple a sum of

money which was given to him by another person; (6) whether between said dates he received from a person other than Ron Pepple a sum of money which he subsequently paid to another person; (7) whether after being directed to appear and testify, he still declined to answer the questions propounded; (8) whether he would continue to refuse to answer similar questions for the reasons stated; and (9) whether he had anything to add to this statement. To each question petitioner replied that he refused to answer the question; that the answer to it would tend to criminate him; and that he would not be a witness against himself (R. 43-45). He also refused to examine and sign the transcript of questions and answers (R. 45). The affidavit further stated that the investigation did not concern the petitioner or any income tax return made by him, or any act done or required to be done by him under the laws of the United States; that the investigation "concerns entirely another"; that he did not believe that the knowledge or information of the petitioner would subject the petitioner to any prosecution; and that the petitioner was fully advised accordingly before being interrogated (R. 38-39). This affidavit prayed for an order upon the petitioner to show cause why he should not be imprisoned until he should obey the prior order of the court, and thus purge himself of contempt (R. 39-40).

On April 26, 1938, the District Court ordered the petitioner to appear before it on April 27th

and show cause why he should not be punished for contempt for disobedience of the court's order of April 23, 1938 (R. 46). On April 27, 1938, the petitioner filed a motion to quash, upon the grounds that the affidavit upon which the rule and order were made was insufficient in law and in fact; that the District Court had no jurisdiction over the person of the petitioner; that the proceedings were improperly entitled because no civil action was pending, no process had been issued, and there were no parties plaintiff or defendant; and that the petitioner's attorney was not allowed to represent him at the proceedings (R. 47-48). The District Court, after hearing (R. 50-57), overruled the motion to quash (R. 57). The petitioner's attorney then stated (R. 57) that "McCrone is here to plead." Mr. Brown, the Assistant United States Attorney, objected to the entry of a plea upon the ground that (R. 58) "This is no criminal proceeding." However, upon further insistence, the petitioner was allowed to enter a plea of not guilty (R. 58, 79). After further argument (R. 58-70), the petitioner was called as a witness in his own behalf (R. 71). He was interrogated regarding the questions asked by Mr. DeFoe, and stated that he believed the answer to a certain question would have incriminated him under the laws of the United States. The petitioner's counsel asked him whether another question and answer had been made at the hearing before the special agent, and under what law he be-

lieved he would incriminate himself (R. 72). The District Court thereupon stated that such form of question had gone far enough (R. 72), and, after further colloquy (R. 73-74), asked if there was any further proof. Upon the statement of petitioner's counsel that there was none, the matter was adjourned until April 28, 1938 (R. 74-77).

Upon that date the District Court entered its order (R. 79-83), finding that the matters set forth in the affidavit filed April 26, 1938, were true (R. 80), that the petitioner (R. 81) "wilfully and deliberately and wrongfully disobeyed the order and command of this Court entered herein on the 23rd day of April 1938, \* \* \* and failed, refused and neglected to give his said testimony as required by said order \* \* \*." The District Court further found (R. 82) that the petitioner "wilfully and deliberately and wrongfully failed and refused to make a full, true, complete, accurate and truthful disclosure of the matters and facts within his knowledge, material and pertinent and concerning the subject matter of the investigation then being carried on by such officer, or to make any disclosure whatsoever, or at all \* \* \*." This order further stated (R. 82-83):

The Court further finds that the said William McCrone did not on the 27th day of April 1938, or at all, and upon his appearance before the above-entitled Court, in obedience to the rule and order to show cause issued by this Court, show any cause what-

soever, or was any cause shown whatsoever by him or on his behalf, why he should not be held in contempt of the above-entitled court, or why he should not obey the order of this Court, dated April 23, 1938; the Court further finds that the prayer of the affidavit filed herein should be granted.

Wherefore, \* \* \* the said William McCrone be and he is hereby committed to the custody of the United States Marshal \* \* \* to be \* \* \* confined \* \* \* and to be held in such confinement \* \* \* until the said William McCrone purges himself of his said contempt by obeying the order of this Court, duly given and made on the 23rd day of April 1938, by giving his testimony before Paul W. DeFoe. \* \* \*.

The petitioner noted an exception (R. 84), and on May 2, 1938, a "Notice of Appeal" was served upon the United States Attorney and filed (R. 2-5) and assignment of errors was served and filed (R. 87-90). On May 6, 1938, the District Judge allowed and signed a bill of exceptions (R. 21-87).

The court below dismissed the appeal (R. 121-122). It held that the contempt was clearly a civil one, but that it had no jurisdiction, since petitioner took an appeal in the manner provided for appeals from a criminal judgment, and had not applied for, or obtained, an allowance of an appeal. Haney, C. J., dissented, on the ground that the appeal was proper under the new Federal Rules of Civil Procedure. A petition for rehearing was denied on January 16, 1939 (R. 122).

## ARGUMENT

## I

We do not oppose the granting of writ of certiorari in the present case. \*

The court below dismissed petitioner's appeal solely because it concluded that the proceeding was one for a civil contempt and that consequently the mode of appeal adopted by the petitioner on the assumption that the contempt was a criminal one gave the court no jurisdiction. The decision was correct if the contempt was in fact civil, since under those circumstances an application for and allowance of appeal, which were not sought or secured, were jurisdictional prerequisites. *Alaska Packers Association v. Pillsbury*, 301 U. S. 174.<sup>1</sup> However, on the question whether the contempt was civil or criminal, the decision of the Circuit

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<sup>1</sup> The petitioner apparently alleges as an alternative argument, and Haney, C. J., dissenting below, concluded that even though the contempt were civil the new Federal Rules of Civil Procedure applied and made an allowance of an appeal unnecessary. We believe that contention wholly unsupported. The order of contempt was entered on April 28, 1938 (R. 77-83) and was a final appealable order by a proper appeal. *Alexander v. United States*, 201 U. S. 117, 122. No proper appeal having been taken, the order became final on July 28, 1938. Consequently, when the new rules became effective on September 16, 1938, there was no case "pending", and Rule 86, which authorizes the application of the rules to all further proceedings in actions "then pending" has no application. *United States v. French*, 95 F. (2d) 922 (C. C. A. 8th), certiorari denied, No. 186, Oct. 10, 1938; *Tighe v. Maryland Casualty Company*, 99 F. (2d) 727 (C. C. A. 9th); *Burr v. United States*, 86 F. (2d) 502 (C. C. A. 7th), certiorari denied, 300 U. S. 664.



Court of Appeals for the Seventh Circuit in *Federal Trade Commission v. A. McLean and Son*, 94 F. (2d) 802, is apparently in conflict with the conclusion of the court below. In that case the Federal Trade Commission attempted to collect by contempt proceedings in the Circuit Court of Appeals a fine approximating the expense to which the Government had been put in discovering the violation of the Commission's decree which in a prior proceeding had been granted enforcement by the court. The court held that such a proceeding could not be one for civil contempt on the ground that such contempts were limited to actions in which some private interest appeared, and that the Federal Trade Commission represented only a public interest. Although we are of opinion that the decision in that case is erroneous, if its language be applied to the present proceeding it would apparently require a holding that in the present case the contempt could not be civil.

So far as the procedure on appeals is concerned, the new Rules of Civil Procedure eliminate the distinctions between civil and criminal appeals which led to the dismissal of the appeal in the present case. Rule 73 (a).

Moreover, the *McLean* case may be distinguished from the present one on the ground that proceedings for enforcement by contempt of a Federal Trade Commission order differ from proceedings to compel a witness to testify before a special agent of the Bureau of Internal Revenue (Cf. *Brownson*

v. *United States*, 32 F. (2d) 844 (C. C. A., 8th); *In re Andrews' Tax Liability*, 18 F. Supp. 804 (Md.); *Federal Trade Commission v. Kleiner*, 280 U. S. 19, 26, 30), or on the ground that in that case, irrespective of the character of the Federal Trade Commission, the proceeding was necessarily one for criminal contempt. Nevertheless, unless the decision in the *McLean* case and that in the present case are either reconciled by this Court or the apparent conflict between them removed, confusion is apt to exist as to the true character of contempt actions brought by the United States or its various instrumentalities and agencies.

## II

We see no reason for the issuance of the writ of mandamus. The petition for the writ seems to be without precedent. Moreover, since direct review is sought, mandamus is unnecessary and unavailable. *Ex parte Baldwin*, 291 U. S. 610; *Ex parte Slater*, 246 U. S. 128, 134.

Respectfully submitted.

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## APPENDIX

Act of February 13, 1925, c. 229, 43 Stat. 936, as amended:

SEC. 8. (c) No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree. (U. S. C., Title 28, Sec. 230.)

### Judicial Code:

SEC. 268. *Administration of oaths; contempts.*—The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts. (U. S. C., Title 28, Sec. 385.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

### SEC. 617. JURISDICTION OF COURTS.

(a) If any person is summoned under the internal-revenue laws to appear, to testify,

or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data. (U. S. C., Title 26, Sec. 1523.)

**SEC. 618. EXAMINATION OF BOOKS AND WITNESSES.**

Section 1104 of the Revenue Act of 1926 is amended to read as follows:

"SEC. 1104. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such persons or persons." (U. S. C., Title 26, Sec. 1514.)